



720 Fourth Avenue, Suite 400  
Kirkland, WA 98033  
(425) 823-6164

**Andrew M. Kenefick**

Senior Legal Counsel, Western Group  
Admitted in Washington  
Direct (425) 825-2003 Fax (866) 863-7961  
[akenefick@wm.com](mailto:akenefick@wm.com)

December 14, 2011

***VIA U.S. MAIL & E-MAIL***

Lawrence Torres (WTR-7)  
U.S. Environmental Protection Agency,  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

David Wampler  
U.S. Environmental Protection Agency,  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

**RE: Issuance of Findings of Violation and Order for Compliance for Waimanalo  
Gulch Sanitary Landfill – CWA-309(a)-12-003**

Dear Messrs. Torres and Wampler:

This letter responds to the November 29, 2011, Finding of Violation (“FOV”) and Order (“Order”) in the Matter of Waste Management of Hawaii, Inc. (“WMH”) and City and County of Honolulu (“CCH”), issued by the United States Environmental Protection Agency (“EPA”), pertaining to alleged violations of the Clean Water Act (“CWA”) at the Waimanalo Gulch Sanitary Landfill (“WGSL”). WMH and CCH intend to cooperate, to the extent feasible, with reasonable requirements of the Order.

However, WMH and CCH specifically request that the findings of fact in the FOV be set aside until such time that the parties have had an opportunity to meet and confer to address certain facts and ensure the record is accurate. WMH and CCH do not admit to the accuracy of any statements made in the findings of the FOV, and reserve the right to challenge the findings in the FOV and the requirements set forth in the Order. Without limiting the prior sentence, WMH and CCH specifically deny the allegations in Paragraphs 21-23 of the Findings.

WMH and CCH further request the requirements of the Order be set aside. WMH and CCH are aware that there is no opportunity for pre-enforcement judicial review of the FOV and Order under existing case law. However, given the U.S. Supreme Court’s pending consideration of pre-enforcement review under the Clean Water Act in *Sackett v. EPA* No. 10-162 (cert granted June 28, 2011) (see also *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010)), WMH and CCH stand ready to challenge the FOV and Order as arbitrary and capricious and an abuse of discretion. WMH and CCH are hopeful that it will reach agreement with EPA to proceed in a reasonable manner, consistent with the purpose and intent of the CWA, following an opportunity to meet and confer.

As you know, pursuant to the Clean Water Act § 309(a)(4), an order issued under the Clean Water Act relating to a violation of section 308 of the CWA “shall not take effect until the person to

whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.” 33 U.S.C. § 1319 (a) (4). WMH and CCH hereby request an opportunity to meet and confer with EPA regarding WMH and CCH comments to the FOV and Order, including but not limited to the comments provided herein.

**A. Comments to Completion of Western Diversion Project Requirements:**

In an effort to cooperate with EPA, WMH and CCH intend to submit a report to EPA documenting the progress towards completion of the Western Diversion Project (“WDP”) with a schedule of completion for all major elements of the WDP. This schedule will identify the current status of the work not yet completed on the elements of the WDP and a projected or estimated completion date for each element of the WDP. WMH and CCH would like to discuss with EPA information pertaining to interim measures designed to prevent, to the extent feasible, stormwater run-on from the up-gradient watershed from reaching active landfill cells, as well as information pertaining to interim measures to prevent, to the extent feasible, discharges from the detention basin from violating the provisions of the General NPDES permit. Timing of WMH and CCH’s submittals will depend on the opportunity to meet and confer with EPA regarding comments to the FOV and Order requirements.

“Complete segregation” of off-site stormwater run-on from on-site stormwater run-off under the design storm conditions used for the planning and design of the WDP is not feasible and is not necessary or reasonable. Nor does it serve any reasonable purpose relevant to ensuring compliance with the Clean Water Act. The requirement in the Order effectively revokes the current Stormwater Management Plan (“SWMP”). The current SWMP anticipates that some stormwater run on from offsite may be collected and managed pursuant to the NPDES General Permit requirements as stormwater from an industrial facility. There is no regulatory purpose under the Clean Water Act justifying complete segregation of stormwater if all of the stormwater collected onsite is treated and managed to meet the requirements set forth in the NPDES permit. For example, what purpose is served by prohibiting uphill flows from commingling with on-site stormwater if the combined flow is directed to the detention basin? WMH and CCH respectfully request an opportunity to present to EPA reasonable design features that will meet the goals of the Clean Water Act, without complete segregation.

The requirement in the Order that “all appurtenant features” needed for the effective operation of the WDP must be operable is vague and ambiguous. WMH and CCH respectfully request that the requirements for the effective operation of the WDP should be limited to those appurtenant features specifically identified in the design and construction documents for the WDP.

**B. Comments to Detention Basin Evaluation Requirements:**

Regulatory requirements under Hawaii law and Subtitle D of the Resource Conservation and Recovery Act (“RCRA”) require landfills to have a run-off control system designed for 25-year, 24-hour storm conditions. The requirement in the Order to evaluate the detention basin for a 100-year, 24-hour storm is not relevant and is overreaching the statutory intent and regulatory requirements of the CWA and RCRA. WMH and CCH respectfully submit that the detention basin should be consistent with existing accepted design requirements of 25-year, 24-hour flows.

Regarding provisions in the Order providing EPA discretion to reject or modify submittals by WMH and CCH, including but not limited to the detention basin evaluation, WMH and CCH respectfully request a minimum 30-day opportunity for informal dispute resolution regarding elements of the plan, or final report, that EPA rejects or modifies. To the extent subsequent provisions in the

Order similarly provide EPA with discretion to reject or modify submittals by WMH and CCH, WMH and CCH object to the lack of opportunity for informal dispute resolution and hereby requests an opportunity to meet and confer with EPA in such instances in an effort to work cooperatively together.

With respect to compliance with NPDES requirements pursuant to the Order, WMH and CCH would like to note that iron and zinc in the native soils in the drainage area of WGS� result in background levels of iron and zinc in stormwater that exceed the permitted levels under the NPDES permit. For that reason, it is infeasible to “achieve full compliance with the NPDES permit requirements for the WGS�, including numeric and non-numeric criteria” for iron and zinc. WMH and CCH respectfully request reevaluation of the iron and zinc permitted levels and consideration of background levels in determining compliance with NPDES permit requirements.

### **C. Comments to Monitoring Plan Requirements:**

The enhanced stormwater monitoring plan required in the Order to sample and analyze stormwater *every day* that stormwater is discharged from the detention pond is unreasonable, not necessary to fulfill the goals of the Clean Water Act, and inconsistent with the General Permit. WMH and CCH respectfully submit that the existing NPDES requirement to sample representative storms is appropriate to ensure full compliance with the Clean Water Act.

Moreover, the sampling requirement is impractical because the stormwater detention basin is designed to detain stormwater and gradually release over time, often over a period of days or even weeks after a storm event. It is unreasonable, unduly burdensome, and legally unsupportable to require ongoing sampling of stormwater discharges days or even weeks after a storm event.

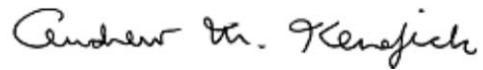
Regardless of the frequency of sampling events WMH and CCH is unable to obtain the necessary laboratory analyses in sufficient time to submit reports by the 15<sup>th</sup> of each month as required by the Order. WMH and CCH respectfully request additional time, for example by the 30<sup>th</sup> of the month if this requirement is applicable. However, the frequency of sampling and reporting required in the Order is unreasonable and unnecessary to meet the requirements of the CWA. For example, monthly reporting will be unnecessary during many dry months and will be unreasonable during months of repeated representative storms. The increased frequency of data collection and reporting required in the Order will not have any impact on the ability to comply with the CWA. WMH and CCH propose application of the existing NPDES sampling intervals and annual reporting requirements. Such a protocol will provide meaningful data and ensure CWA compliance. This is also consistent with other facilities monitored by the General NPDES permit for CWA compliance.

WMH and CCH object to the requirement in Paragraph 25 of the Order for ongoing sampling and reporting with no end date. There is no regulatory or statutory support to justify EPA’s oversight in perpetuity. WMH and CCH submit that the operation of WGS� is in compliance with its stormwater permit and related regulatory requirements and that EPA’s ongoing oversight is not justified under the law. Therefore, WMH and CCH request that the requirements of the Order be limited to a reasonable period of time.

December 14, 2011

In conclusion, your letter dated November 29, 2011 indicated that you are prepared to discuss any concerns we may have. Toward that end, and pursuant to CWA § 309(a)(4), please contact me at your earliest convenience to schedule a meet and confer to discuss issues including, but not limited to, the issues set forth in this letter.

Sincerely,

A handwritten signature in black ink that reads "Andrew M. Kenefick". The signature is written in a cursive, slightly slanted style.

Andrew M. Kenefick

cc: *via e-mail only*

Dana Viola – City & County of Honolulu

Mike Tsuji – Hawaii DOH

[LL2 to EPA re Stormwater FVO \(12/14/11\)](#)